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Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

October Term 1986

Thomas E. McGovern, Appellant

vs.

State of New Jersey, Appellee

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Do the arbitrary and mandatory 10-year license revocation provisions of N.J.S.A. 39:4-50(a)(3) that apply to third offenders of New Jersey's Drinking Driving Law, violate due process of law?

Does the failure of N.J.S.A. 39:4-50(a)(3) to provide a means for a third offender of that law to seek reinstatement of his license before the end of 10 years violate due process of law?

TABLE OF CONTENTS

Opinion 1

Grounds of Jurisdiction 2

Questions Presented 4

Statement of Case 4

Federal Questions are Substantial 7

Conclusion 16

Appendix A. Opinion of Superior Court of New Jersey Appellate Division 17

Appendix B. Denial of Petition for Certification to New Jersey Supreme Court 24

Appendix C. Notice of Appeal to Supreme Court of United States.... 26

Appendix D. Text of New Jersey Statute N.J.S.A. 39:4-50 29

TABLE OF AUTHORITIES

CASES:

1. Bell v Burson,
402 U.S. 535,
91 S.Ct. 1586 (1971) 8-10, 13

2. Berkemer v. McCarty,
468 U.S. 420,
104 S. Ct. 3138 (1984) 15

3. Burgardeanu v. England,
219 A. 2d 104
(D.C. Ct. App. (1966) 12

4. Greenholtz v. Inmates of Nebraska Penal & Cor.,
442 U.S. 1,
99 S. Ct. 2100 (1979) 14

5. Lane Distributors, Inc., v. Tilton,
7 N.J. 349 (1951) 9

6. Vance v. State,
67 N.J. Super. 63
(App. Div. 1961) 11,12

7. State v. N.J. Trade Waste Ass'n.,
191 N.J. Super. 144
(Law Div. 1983)..... 9

8. State v. Macuk,
57 N.J. 1 (1970) 15

STATUTES:

N.J.S.A. 39:4-50 1-7,11,14

N.J.S.A. 30:4-123.45, et seq 14

28 U.S.C.S. §1257(2) 3

OTHER AUTHORITIES:

60 ALR 3rd, p.357 12

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

Thomas E. McGovern, Appellant

vs.

State of New Jersey, Appellee

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

JURISDICTIONAL STATEMENT

Appellant submits herewith the jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, was a non-published opinion and held that the 10 year mandatory license revocation provision of N.J.S.A. 39:4-50 does not violate due process of law and the failure of that statute to provide a means for

reinstatement of a third offenders license prior to the expiration of the 10 year period is also not a violation of due process of law.

GROUNDS OF JURISDICTION

The proceedings in this case challenged the mandatory 10 year license revocaton provisions of New Jersey's Drinking Driving Law, N.J.S.A. 39:4-50(a)(3), as being repugnant to the Constitution of the United States.

The judgment sought to be reviewed is that of the Superior Court of New Jersey Appellate Division dated June 30, 1986 and filed on the same date. It upheld the validity of the challenged provision of the Statute.

A petition for certification of the judgement of the Appellate Division of the Superior Court of New Jersey was submitted

to the Supreme Court of New Jersey. The petition was denied September 30, 1986 and filed on October 2, 1986.

On December 19, 1986 a notice of appeal to the Supreme Court of the United States was filed with its clerk.

Jurisdiction for this appeal is conferred by 28 U.S.C.S. Section 1257 (2). This section of the United States Code sets forth that final judgments of the highest court of a state may be reviewed by the United States Supreme Court by appeal where the validity of a statute of any state is drawn in question as being repugnant to the United States Constitution and the judgment of the State Court is in favor of its validity.

QUESTIONS PRESENTED

Do the arbitrary and mandatory 10 year license revocation provisions of N.J.S.A. 39:4-50(a)(3) that apply to third offenders of New Jersey's Drinking Driving Law, violate due process of law?

Does the failure of N.J.S.A. 39:4-50(a)(3) to provide a means for a third offender of that law to seek reinstatement of his license before the end of 10 years violate due process of law?

STATEMENT OF THIS CASE

On July 1, 1985 the appellant entered a plea of guilty as a third offender under New Jersey's drinking Driving law.

The plea was entered in the Municipal Court of the Boro of Freehold, New Jersey. The municipal court judge, among other sanctions, was mandatorially required to revoke the drivers license of the appellant for 10 years. He could not

consider any mitigating factors as they might relate to the license revocation period.

New Jersey does not have in its law a means for a person to obtain a special license to work and earn a living after his license has been revoked for any reason.

A municipal court judge in New Jersey does not have the jurisdiction to declare a State Statute or part thereof unconstitutional. Even so, it was at this initial level that the issue of the validity of the 10 year revocation provision was raised.

An appeal, limited solely to the issue of the constitutionality of the 10 year mandatory revocation provision of N.J.S.A. 39:4-50 was filed and heard de novo on the record of the Municipal Court

of the Borough of Freehold by a Judge of the Superior Court of New Jersey Law Division-Criminal, Monmouth County.

The Judge at this level held that there was no constitutional defect in the Statute and he was bound to enforce it as written by the legislature.

An appeal from this decision was filed in the Superior Court of New Jersey Appellate Division and the same issues were presented to that court.

The Appellate Division of the Superior Court of New Jersey at p. 2 of its decision said:

> On this appeal the defendant argues that this mandatory 10 year license revocation imposed under the motor vehicle law violates due process of law and that the failure of that statute to provide a means for reinstatement of a third offender's license (prior to the expi-

ration of that period) violates due process of law.

This language clearly shows that the issues presented and the rulings of that court upholding the validity of the statute are of a nature to bring this case within the Jurisdiction of the United States Supreme Court.

FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal presents a question of public importance involving the constitutionality of a provision of New Jersey's "drinking and driving law", N.J.S.A. 39:4-50.

The mandatory ten (10) year license revocation provision of that statute violates due process of law. It fails to provide a meaningful hearing before a defendant's license can be revoked and it fails to provide a means to restore a

defendants license during the ten (10) year period if the reason for the suspension ceases to exist.

Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971) held that a persons drivers license is not to be taken away without that procedural due process required by the Fourteenth Amendment.

The Bell Court recognized:

> Once licenses are issued as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involved State action that adjudicates important interests of the licensees.

Bell, 402 U.S. at ___, 91 S.Ct. at 1589.

The right to earn a livelihood is a property right which is guaranteed by the 5th and 14th Amendments of the Federal Constitution and the Constitution of the

State of New Jersey. Lane Distributors, Inc., v. Tilton, 7 N.J. 349 (1951); State v. N.J. Trade Waste Ass'n., 191 N.J. Super. 144 (Law Div. 1983).

Licenses, therefore, should not be taken away without due process, and due process requires a hearing before the license should be taken for an extended period.

The hearing required by the Due Process Clause must be meaningful and appropriate to the nature of the case. Bell v. Burson, supra. The Bell Court said:

> While "(m)any controversies have raged about * * * the Due Process Clause," it is fundamental that except in emergencey situations (and this is not one) due process requires that when a state seeks to terminate an interest such as that here involved, it must afford "notice and op-

> portunity for hearing appropriate to the nature of the case" before the termination becomes effective.

Bell, 402 U.S. at ___, 91 S.Ct. at 1591 (citations omitted).

The Court also said:

> The State argues that the licensee's interest in avoiding the suspension of his license is outweighed by countervailing govermental interests and therefore that this procedural due process need not be afforded him. We disagree.

Bell, 402 U.S. at ___, 91 S.Ct. at 1590.

While the government's interest in protecting the public from the drinking driver is important, it cannot justify the removal of a persons license when no emergency exists without a meaningful hearing and procedural due process.

There was no hearing of any kind before the removal of the appellant's license for ten (10) years and no emergency existed because his license had been taken as a result of the prior violations.

Because of the mandatory ten (10) year revocation provisions of the statute, the defendant was precluded from effectively presenting any medical evidence pertinent to his situation, any evidence of the effect of the revocation upon his ability to support himself or his family, and any other evidence, including his prior good driving record that had a bearing upon whether his license should have been revoked for ten (10) years.

Under statutes such as N.J.S.A. 39:4-50, license revocations are designed to protect the public and not designed to punish the licensee. Vance v. State,

67 N.J. Super. 63 (App. Div. 1961); Bungardeanu v. England, 219 A. 2d 104 (D.C. Ct. App. 1966); 60 ALR 3rd at p. 357.

The punitive aspects of that statute are clear and consist of fines, jail terms, community service and surcharges.

Implicit in N.J.S.A. 39:4-50 is the legislative recognition that persons involved in driving and drinking may have a drinking problem that can be treated.

It provides in part that in lieu of a jail sentence a person...

> "...may be committed to an inpatient rehabilitation program..."

It does not provide for a reduction in the ten (10) year revocation or a procedure for reinstatement of a third offender's license if treatment is successful or the reason for the revocation ceases to exist.

Bell v. Burson, supra., by holding an issued drivers license is an "important interest" or an "entitlement" eliminated any distinction between a right and a privilege as these terms may be applied to a drivers license.

If a drivers license is an "entitlement" as decreed by the Supreme Court of the United States, and the right to earn a livelihood is a property right, an extended mandatory period of revocation, such as ten (10) years, without a procedure for reinstatement, violates due process of law.

The failure of our legislature to provide a mechanism for third offenders to seek reinstatement of their license before the end of ten (10) years, if the circumstances warrant reinstatement, renders

that part of N.J.S.A. 39:4-50 unconstitutional within the meaning of Bell v. Burson, supra.

This is especially applicable in states that have inadequate mass transit systems.

Persons convicted of serious crimes are entitled to periodic review of their sentence to determine parole eligibility, N.J.S.A. 30:4-123.45, et seq. The key areas for parole consideration are protection of the public and rehabilitation of the defendant. Greenholtz v. Inmates of Nebraska Penal & Cor., 442 U.S. 1, 99 S. Ct. 2100 (1979).

If a person has successfully conquered a drinking problem and no longer is a danger to the public, there is no reason to keep such a person off the roads. To

deprive such a person of a meaningful hearing for reinstatement violates procedural due process.

It is the obligation of our judicial system not only to protect the public but, more important, to protect individuals from over zealous action of legislatures and courts that is based upon public furor and fear.

No longer can our judicial system deny persons accused of or convicted of drunk driving full protection of the law because their violation is not serious enough to warrant that kind of protection, or because it would not be expedient from a law enforcement and a judicial administration standpoint to permit that protection. See State v. Macuk, 57 N.J. 1 (1970) which was specifically overruled by Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984).

CONCLUSION

Appellant submits that this appeal brings before the court substantial federal questions which require plenary consideration, with briefs on the merits and oral arguement.

Respectfully submitted,

TANNER, MCGOVERN & VERGA
Attorneys for Defendant-Petitioner

By: /s/ William D. McGovern
WILLIAM D. MCGOVERN

APPENDIX A

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-954-85T4

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

THOMAS E. MC GOVERN,
Defendant-Appellant.

Submitted: June 16, 1986
Decided: June 30, 1986
Filed: June 30, 1986

Before Judges Pressler and Petrella.

On appeal from Superior Court, Law Division, Monmouth County.

Tanner, McGovern & Verga, attorneys for appellant (William D. McGovern on the brief).

John A. Kaye, Monmouth County Prosecutor, attorney for respondent (Mark P. Stalford, Assistant Prosecutor, of counsel and on the letter brief).

PER CURIAM

The sole issue on this appeal is the mandatory sentence required for a third offender convicted of driving while under the influence. Defendant pleaded guilty to driving under the influence, the third such conviction within the space of less than a year.[1] He entered this plea with knowledge of the statutory penalties and with the understanding that a separate charge of reckless driving would merge with the conviction of driving under the influence. Defendant did not contest the charge of driving under the influence or the fact that it was a third offense. His sole challenge in the courts below and here is an attack on the third offense

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1 The convictions in the other two driving under the influence cases were appealed to this court. These convictions were affirmed in decisions under docket NO. A-4280-84, on April 23, 1986 and docket No. A-2254-84, on March 5, 1986.

penalty provisions. The municipal court judge sentenced defendant as a third offender and imposed a $1,000 fine, a $100 surcharge, 180 days in-patient care at a Veterans Administration hospital, and revoked defendant's driver's license for the mandatory 10 years. On appeal to the Law Division defendant contested the sentence. The judge rejected his arguments and the identical penalties were imposed.

On this appeal defendant argues that the mandatory 10 year license revocation imposed under the motor vehicle laws violates due process of law and that the failure of that statute to provide a means for reinstatement of a third offender's license (prior to the expiration of that period) violates due process of law.

Defendant argues that the penalty aspects of the statute were satisfied by the imposition of the fine and the surcharge, as well as commitment to a rehabilitation program, and that since the statute does not provide for reinstatement of a license if the program proves successful, an important interest is being eliminated, thus violating due process of law.

N.J.SA. 39:4-50 provides in part:

> For a third or subsequent violation a person...shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years.

We reject defendant's argument that an extended term of revocation of a driver's license is not intended to be punitive. The revocation has both punitive and deterrent aspects, both to him and to others. Here, this defendant

was convicted on two prior occasions within a very short period of time, and nonetheless, while his license revocation sentences were stayed pending appeals, he received a driving while under the influence summons on December 12, 1984. Obviously, the shorter revocation periods imposed on the prior convictions were not sufficiently punitive for defendant.

Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), relied on by defendant, does not provide support for his argument that due process requires a separate hearing on this penalty. That case involved a requirement for the posting of security for uninsured motorists in negligence actions without regard to whether the defendant was negligent or at fault.

Mandatory sentencing provisions have been determined to be constitutionally proper. See, e.g. Rummell v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (mandatory life sentences upheld under Texas recidivist statute); State v. Stewart, 96 N.J. 596 (1984) (upholding mandatory sentencing provision of the Graves Act).

Here, defendant declined the opportunity to contest the complaint against him, unlike the defendant in Bell, and pleaded guilty.

We find no merit in defendant's argument that the failure of N.J.S.A. 39:4-50 to provide a means for reinstatement of the third offender's license during the suspension violates due process. R. 2:11-3(e)(2). Defendant was represented by counsel and was fully aware

of the penalties involved as a consequence of his plea and had the opportunity for a hearing to contest his guilt.

Affirmed.

A TRUE COPY

/s/ Elizabeth McLaughlin

ELIZABETH McLAUGHLIN

Clerk

APPENDIX B

SUPREME COURT OF NEW JERSEY
C-117 SEPTEMBER TERM 1986

26,031

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs. ON PETITION FOR CERTIFICATION

THOMAS E. MC GOVERN,
Defendant-Petitioner,

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-954-85T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 30th day of September, 1986.

Filed October 2, 1986.
A TRUE COPY

/s/ Stephen Townsend
STEPHEN TOWNSEND

APPENDIX C

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs. No. A-954-85T4

THOMAS E. McGOVERN,
Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Thomas E. McGovern, the Defendent-Appellant above named, hereby appeals to the Supreme Court of the United States from the June 30, 1986 final judgment of the Superior Court of New Jersey, Appellate Division, which affirmed the decision of the Superior Court of New Jersey, Law Division, Monmouth County.

A Petition for Certification of the judgment of the Superior Court, Appellate Division, was filed with the Supreme Court of the State of New Jersey, and that Petition for Certification was denied on September 30, 1986.

This appeal is taken pursuant to the United States Code, Title 28, Section 1257.2.

Filed: December 19,1986

Respectfully submitted,

/s/William D. McGovern
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Appellant
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Appendix D

39:4-50. Operating or allowing operation by person under influence of liquor or drugs; penalties; alcohol education or rehabilitation; collection of driver's license; rights of discovery; intoxicated driver resource centers

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits

another to operate a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood, shall be subject:

(1) For the first offense, to a fine of not less than $250.00 nor more than $400.00 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not less than six months nor more than one year. (Last additions in text indicated by underline; last deletions by strikeouts.)

(2) For a second violation, a person shall be subject to a fine of not less than $500.00 nor more than $1,000.00, and shall be ordered by the court to perform community service for a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances, and shall be sentenced to imprisonment for a term of not less than 48 consecutive hours, which shall not be suspended or served on probation, nor more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years upon conviction, and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which

application may be granted at the discretion of the director, consistent with subsection (b) of this section.

(3) For a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circum-stances and shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years.

If the driving privilege of any person is under revocation or suspension for a violation of any provision of this Title at the time of any conviction for a violation of this section, the revocation

or suspension period imposed shall commence as of the date of termination of the existing revocation or suspension period. A court that imposes a term of imprisonment under this section may sentence the person so convicted to the county jail, to the workhouse of the county wherein the offense was committed, to an inpatient rehabilitation program or to an Intoxicated Driver Resource Center or other facility approved by the Director of the Division of Motor Vehicles and the Director of the Division of Alcoholism in the Department of Health; provided that for a third or subsequent offense a person shall not serve a term of imprisonment at an Intoxicated Driver Resource Center as provided in subsection (f).

A person who has been convicted of a previous violation of this section need not be charged as a second or subsequent

offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second or subsequent offender, but if the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.

(b) A person convicted under this section must satisfy the screening, evaluation, referral and program requirements of the Division of Motor Vehicles' Alcoholism's Bureau of Alcohol Countermeasures, and of the Intoxicated Driver Resource Centers and a program of alcohol education and highway safety, as prescribed by the Director of the Division

of Motor Vehicles. The sentencing court shall inform the person convicted that failure to satisfy such requirements shall result in a mandatory two day term of imprisonment in a county jail and a driver license revocation or suspension and continuation of revocation or suspension until such requirements are satisfied, unless stayed by court order in accordance with Rule 7:8-2 of the N.J. Court Rules, 1969, or R.S. 39:5-22. Upon sentencing, the court shall forward to the Bureau of Alcohol Countermeasures a copy of a person's conviction record. A fee not to exceed of $40.00 shall be payable to the Division of Motor Vehicles for the Bureau of Alcohol Countermeasures' screening and evaluation program Alcohol Education, Rehabilitation and Enforcement Fund established pursuant to section 3, P.L. 1983, c. 531 (C. 26:28-32) to support the

Bureau of Alcohol Countermeasures, to defray the cost of screening, evaluation and alcohol education programs in the Intoxicated Driver Resource Centers.

(c) Upon conviction of a violation of this section, the court shall collect forthwith the New Jersey driver's license or licenses of the person so convicted and forward such license or licenses to the Director of the Division of Motor Vehicles. The court shall inform the person convicted that if he is convicted of personally operating a motor vehicle during the period of license suspension imposed pursuant to subsection (a) of this section, he shall, upon conviction, be subject to the penalties established in R.S. 39:3-40. The person convicted shall be informed orally and in writing. A person shall be required to acknowledge receipt of that written notice in writing.

Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of R.S. 39:3-40. In the event that a person convicted under this section is the holder of any out-of-state driver's license, the court shall not collect the license but shall notify forthwith the director, who shall, in turn, notify appropriate officials in the licensing jurisdiction. The court shall, however, revoke the nonresident's driving privilege to operate a motor vehicle in this State, in accordance with this section. Upon conviction of a violation of this section, the court shall notify the person convicted, orally and in writing, of the penalties for a second, third or subsequent violation of this section. A person shall be required to acknowledge

receipt of that written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of this section.

(d) The Director of the Division of Motor Vehicles shall promulgate administrative rules and regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.) in order to effectuate the purposes of this set establish a program of alcohol education and highway safety, as prescribed by this act.

(e) Any person accused of a violation of this section who is liable to punishment imposed by this section as a second or subsequent offender shall be entitled to the same rights of discovery as allowed defendants pursuant to the Rules Governing

Criminal Practice, as set forth in the Rules Governing the Courts of the State of New Jersey.

(f) The counties, in cooperation with the Division of Alcoholism and the Division of Motor Vehicles, but subject to the approval of the Division of Alcoholism, shall designate and establish on a county or regional basis Intoxicated Driver Resource Centers. These centers shall have the capability of serving as community treatment referral centers and as court monitors of a person's compliance with the ordered treatment, service alternative or community service. All centers established pursuant to this subsection shall be administered by a certified alcoholism counsellor or other professional with a minimum of five years' experience in treatment of alcoholism. All centers shall be required to develop

individualized treatment plans for all persons attending the centers; provided that the duration of any ordered treatment or referral shall not exceed one year. It shall be the center's responsiibility responsibility to establish networks with the community alcohol education, treatment and rehabilitation resources and to receive monthly reports from the referral agencies regarding a person's participation and compliance with the program. Nothing in this subsection shall bar these centers from developing their own education and treatment programs; provided that they are approved by the Division of Alcoholism.

Upon a person's failure to report to the initial screening or any subsequent ordered referral, the Intoxicated Driver

Resource Center shall promptly notify the sentencing court of the person's failure to comply.

Required detention periods at the Intoxicated Driver Resource Centers shall be determined according to the individual treatment classification assigned by the Bureau of Alcohol Countermeasures. Upon attendance at an Intoxicated Driver Resource Center,a person shall be assessed a per diem charge not to exceed <u>of</u> $25.00 to be collected by the center and used to defray costs. The per diem charge may be waived by the sentencing court upon good cause shown.

<u>The centers shall conduct a program of alcohol education and highway safety, as prescribed by the Director of the Division of Motor Vehicles.</u>

The Director of the Divisions of Alcoholism and Motor Vehicles Director of the Division of Alcoholism shall adopt rules and regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), in order to effectuate the purposes of this subsection.

Amended by L.1977, c. 29, § 1; L.1981, c. 47, § 1, eff. Feb. 25, 1981; L.1981, c. 537, § 1; L.1982, c. 53, § 2, eff. July 1, 1982; L.1982, c. 58, § 1, eff. July 6, 1982; L.1983, c. 90, § 2, eff. March 11, 1983; L.1983, c. 129, § 1, eff. April 7, 1983; L.1983, c. 444, § 1; L.1984, c. 243, § 1, eff. Jan. 2, 1985.